IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 720 OF 2006

Hasmukh R.Patel. ... Appellant.
Versus.
Municipal Corporation of Greater
Mumbai. ... Respondent.

FIRST APPEAL NO. 721 OF 2006

Dhaval Nanji Vicchivora. ... Appellant.
Versus.
Municipal Corporation of Greater
Mumbai. ... Respondent.

FIRST APPEAL NO. 722 OF 2006

Mulchand T. Dedhia. ... Appellant.
Versus.
Municipal Corporation of Greater
Mumbai. ... Respondent.

FIRST APPEAL NO. 723 OF 2006

Nanji Dhanji Vacchivora. ... Appellant.
Versus.
Municipal Corporation of Greater
Mumbai. ... Respopndent.

FIRST APPEAL NO. 724 OF 2006

Smt.Vasanti M.Gada. ... Appellant.
Versus.
Municipal Corporation of Greater
Mumbai. ... Respondent.

FIRST APPEAL NO. 725 OF 2006.

Mahendra T.Dedhia. ... Appellant.
Versus.
Municipal Corproation of Greater
Mumbai. ... Respondent.

Shri Bipin Joshi for the Appellants in all the Appeals.

Shri J.J.Xavier for the Respondents in all the Appeals.

CORAM : ABHAY S.OKA, J.

DATED : 5th May, 2006.

P.C.:

1. Admit. The learned Advocate for the Respondent waives service. Taken up for hearing forthwith. As the facts of all the Appeals are more or less identical, a reference is made to the facts of the case in the First Appeal No.720 of 2006.

2. The challenge by the Appellants/Plaintiffs in the suit filed in the trial Court was to the notice issued under section 351 of the Bombay Municipal Corporation Act, 1888 and the order dated 5th January 2001 passed on the basis of the said notice. The trial Court by a common Judgment and order decided the suits by passing the following order:

> "1. Suit Nos.396/2001 to 401/2001 stand disposed of with following order:
>
> 2. The case is remanded back to the Executive Engineer, Building and Proposal of BMC for consideration of the regularisation proposal of the suit structure.
>
> 3. Plaintiff should submit for proposal for regularisation of the suit premises as required u/s.342 of the BMC Act to the Executive

Engineer, Building & Proposal within eight weeks from the date of passing of this order along with all requisite documents and after receipt of such proposal, concerned authority to consider the same as per rules on merits within six months from the date of receipt of the proposal.

4. In case the order of the concerned authority regarding regularisation of Plaintiffs' structure goes adverse to the plaintiffs, then corporation shall not act upon impugned notice for a period of four weeks in order to enable the plaintiffs to take appropriate steps in the matter."

3. The learned Advocate for the Appellants submitted that the specific contention raised in the plaint was that the suit structure was authorised and a contention was also raised that the structure was in existence before the datum line. He submitted that in the alternative, a contention was raised that the structure can be regularised. He submitted that the Appellants led evidence and produced voluminous documents in support of their case that the structures were constructed prior to the datum line. He invited my attention to the repair permission granted which allegedly refers to the suit structures and which

records that the suit structures were in existence in the year 1961-62. He submitted that without considering the merits of the suit, the learned trial Judge has adopted a peculiar method of remanding the case to the Executive Engineer, Building Proposals for consideration of regularisation proposal. He submitted that the suits ought to have been decided on merits. He categorically stated that the Appellants in these Appeals are not at all interested in applying for regularisation and the contention in the plaint pleaded in the alternative regarding regularisation of the suit structure is expressly given up by the Appellants. He, therefore, submitted that the suit may be remanded to the trial Court.

4. Shri Xavier appearing for the Respondent-Corporation invited my attention to the observation made by the learned trial Judge in paragraph 5 of the decision. He also pointed out the finding recorded in paragraph 13 of the Judgment and pointed out that the Appellants in these Appeals desired to apply for regularisation.

5. I have considered the submissions. A perusal of the plaint in L.C.Suit No.396 of 2001 discloses that the challenge in the suit is to the notice under section 351 of the Bomaby Municipal Corporation Act, 1888 and the order passed thereon. A perusal of paragraphs 17 and 18

of the plaint shows that without prejudice to the contentions raised on merits, a submission has been made that the structures can be regularised as sufficient F.S.I. is available. The perusal of the entire judgment shows that there is nothing to indicate that the Appellants gave up their main prayers of declaration and injunction and confined the suit only to the contention raised in the alternative. In fact in paragraph 5 of the judgement the learned Judge noted that the contention regarding regularisation was in the alternative to the main plea in the suit. In fact the Appellant had led evidence and had placed on record certain documents which alletedly show the existence of the suit structure before the datum line.

6. A reference will have to be made to the issues framed by the learned trial Judge, which read thus:

	Issues.	**Findings**
1.	Whether plaintiffs are entitled for the reliefs sought ?	Cases are remanded back for considera-tion of plaintiffs' regularisation proposal.
2.	What decree or order ?	as per final order.

If the averments in the plaint and the written statement are considered it is obvious that the issues are not at all properly framed. In fact the issues are framed contrary to Rule 1 of the Order XIV of the Code of Civil

Procedure, 1908. There is no discussion in the impugned Judgment about the documentary evidence on record and about the case made out by the Appellants regarding existence of the suit structure before the datum line. In my view, the entire judgment is written in most unsatisfactory manner and therefore, a case for remand is made out. However, it is made clear that the order of remand is being passed on the basis of the statement made by the Advocate for the appellants that the Appellants are not interested in applying for regularisation and that they want to establish their case as regards the challenge to the impugned notice and the impugned order on merits. As noted earlier, the Appellants have given up their contention regarding regularisation which is pleaded in paragraph 18 of the plaint.

7. Hence the following order is passed:

i) The impugned Judgments and Decrees are set aside.

ii) L.C.Suit Nos.396/2001, 397/2001, 398/2001, 399/2001, 400/2001, and 401/2001 are restored to file. The parties will appear before the learned trial Judge on 10th July 2006 at 11.00 a.m. . The learned trial Judge will frame proper issues arising out of the pleadings and

the parties will be at liberty to lead evidence on those issues in addition to the evidence which is already on record.

iii) The learned trial Judge will decide the suits afresh in the light of the observations made in this judgment and after considering the evidence already on record and the evidence which will be adduced after the order of remand. The learned trial Judge will decide the suits as expeditiously as possible and preferably on or before 30th April 2007.

iv) Till disposal of the suits the interim order which was operating during the pendency of the suits will continue to operate till disposal of the suit.

v) All contentions of the parties are kept open.

vi) The Appeals are partly allowed in above terms with no order as to costs.

vii) The parties and the concerned Court to act on an authenticated copy of this order.

Judge.